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Supreme Court, U.S.
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No. 10-1249

IN THE

Supreme Court of the United States

RICHARD A. TROPP,
ON BEHALF OF HIMSELF AND ALL OTHERS
SIMILARLY SITUATED,

Petitioner,

v.

CORPORATION OF LLOYD'S,
ALSO KNOWN AS THE SOCIETY OF LLOYD'S,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF GEOFFREY C. HAZARD, JR. AND MICHAEL TRAYNOR AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

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[1] Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel for petitioner and respondents received timely notice of amici's intent to file this brief and have consented to its filing.

SUMMARY OF ARGUMENT

This case presents opportunity to clarify an important question in recognition of foreign judgments: Is it sufficient that the court rendering the judgment (here, that of the United Kingdom) provides "system fairness," where in the specific case the foreign court did not address the merits but deferred to a decision by an intensely interested party?

In the leading case involving the recognition of foreign judgments, *Hilton v. Guyot,* 159 U.S. 113 (1895), the Court referred to the general principle that the foreign judgment must have been rendered "under a system of jurisprudence likely to secure an impartial administration of justice," *id.* at 202. The Uniform Foreign Money-Judgments Recognition Act (1962), subsequently adopted by many States, has been interpreted as requiring only system fairness but not fairness in the specific case. The "system fairness" standard permits enforcement in the U.S. of a judgment that clearly violates "specific case" fairness. Many Americans today are exposed to litigation in other countries, after which enforcement of a foreign judgment is sought in this country, as was Mr. Tropp and hundreds of other Lloyd's "Names."

The Court should hold that a foreign court's "system fairness" is insufficient Due Process protection of a specific "person," which is the requirement of the Fifth and Fourteenth Amendments. Where a person has been denied opportunity to contest the merits before an impartial decision-maker, the principle in *Tumey v. Ohio*, 273

U.S. 510 (1927) and subsequent decisions, precludes enforcement of the resulting judgment. Petitioner was denied Due Process in the courts below, by their recognition here of a United Kingdom judgment that simply accepted the legal and factual merits of Lloyd's decision.

ARGUMENT

I. Background

Petitioner Rick Tropp invested as a "Name" in Lloyd's and agreed to choice of forum and choice of law clauses, giving the UK courts exclusive jurisdiction. Tropp demanded that he *not* be included in Lloyd's syndicates insuring against environmental liability. Lloyd's' agents nevertheless put him in numerous environmental liability syndicates and refused to permit him to resign. The environmental liability claims burgeoned, notably including huge asbestos losses.

To cope with these unsustainable losses, Lloyd's put together a "Reconstruction and Renewal" plan and created a new entity, "Equitas," to which it consigned thousands of Names, including Mr. Tropp and many other Americans. Under the "R&R" these Names were made obligors on *previously* accrued environmental claims. Mr. Tropp was assigned to this liability through an agent appointed by Lloyd's and identified as "AUA9". The R&R plan also required all such Names, by contract imposed on them, to "pay now, sue later," (*i.e.*, pay losses and then only dispute their liability). The R&R contract in addition had a "conclusive evidence" clause under which a Lloyd's entity ("Members Service Unit") made calculations of

Names' liability that were "conclusive evidence as between the Names and Equitas, in the absence of manifest error." ("Manifest error" included evident error in arithmetic, but not underlying tort or breach of contract claims.)

The sweeping character of Lloyd's' ensuing actions is summarized by Professor Courtland Peterson, a scholar in this area of the law, as follows: ". . . Lloyd's then set about suing the non-accepting Names on these assigned claims. . . . The proceedings against the non-accepting Names on these assigned claims scarcely deserves the name of 'trial,' because of several extraordinary clauses in the Equitas contracts" (referring to the "pay not, sue later" and "conclusive evidence" clauses). Courtland H. Peterson, *Limits on the Enforcement of Foreign Country Judgments and Choice of Law and Forum Clauses*, in James A. R. Nafziger & Symeon C. Symeonides eds., Law and Justice in a Multistate World: Essays in Honor of Arthur T. Von Mehren 173, 181 (2002). *See also* his earlier article, Courtland H. Peterson, *Choice of Law and Forum Clauses and the Recognition of Foreign Country Judgments Revisited Through the Lloyd's of London Cases*, 60 La. L. Rev. 1259 (2000).

Lloyd's has sued many of the Names, including Mr. Tropp. Most Names simply folded and have been pursued for millions of dollars by Lloyd's in this country. Mr. Tropp tried to defend the Lloyd's UK suit against him, mindful that otherwise he would be held to have forfeited that opportunity. However, his defenses were denied as being beyond consideration by the UK Court. Mr. Tropp's request for leave to appeal was similarly denied. He then tried

unsuccessfully to sue Lloyd's in the UK. That attempt was also rejected in deference to Lloyd's.

Mr. Tropp then brought this declaratory judgment proceeding in the Southern District of New York, asserting that the UK judgment was not valid because it was based on unilateral Lloyd's determinations that the UK courts regarded as beyond their examination. The District Court held that because UK courts exhibited "system fairness," the UK judgment is entitled to enforcement here, even if in his specific case Mr. Tropp was not afforded opportunity to defend on the merits.

The Second Circuit refused to accept that *Tumey v. Ohio,* 273 U.S. 510 (1927), applies, on the ground that "Tropp is not facing criminal charges, but rather a civil judgment for breach of contract," and that the "UK courts themselves had no financial interest in the outcome of Tropp's case." It is of course true that this is a civil case, not a criminal one, and that the UK courts had no financial interest in the outcome. It is also true, however, that the decision in *Tumey* itself relied on civil cases, and that its principle has subsequently been applied in civil cases. It is also true that Lloyd's, whose decision was given "*conclusive*" deference by the UK courts, had a very substantial "financial interest in the outcome."

The UK courts' refusal to provide any meaningful avenue to challenge Lloyd's' assertion of liability effectively rendered Lloyd's the sole determiner of its entitlements. Accordingly, the UK courts also violated the companion principle that courts must provide a reasonable opportunity to be heard, as the Petition urges (pp. 29-32).

II. *Hilton v. Guyot* and Judgment Recognition

Hilton v. Guyot, 159 U.S. 113 (1895), held that, under principles of comity, a foreign country judgment should be recognized in this country where it resulted from a reasonably fair judicial procedure and the foreign country provides reciprocal recognition. The Court did not have to decide, nor did it decide, the standard for determining whether the rendering court's judicial procedure was fair or whether core principles of due process including an impartial tribunal and a reasonable opportunity to be heard were required in each case in addition to a requirement for overall "system fairness." It did hold that the fact that "one of the plaintiffs was permitted to testify not under oath, and was not subjected to cross-examination by the opposite party," under a procedure "according to the laws of France," was not "a sufficient ground for impeaching the foreign judgment." *Id.* at 204-205. (Under civil law procedure the court conducts cross examination.) Thus, the Court rendered a holding on an evidentiary issue at the margins of due process but left undeveloped the core due process principle of impartiality that it later reached, in the domestic context, in *Tumey v. Ohio*. The instant case affords an opportunity to articulate and apply the *Tumey* principle to foreign judgments. The result thus will be two clear and necessary "bookends" in this important area of the law, one in *Hilton* itself marking what is not required at the margins of due process, the other, in this case, marking what is required at the core.

Subsequently to *Hilton*, the Commission on Uniform State Laws promulgated the Uniform Foreign Money-Judgments Recognition Act (1962),

which has since been adopted in many States; more recently, fifteen states have adopted the 2005 version of that Act. In assessing whether a foreign judgment was based on a fair procedure, there have been two concepts: "System fairness," meaning that the foreign court system is generally fair, and "specific fairness," referring to whether there was reasonably fair judicial procedure in the specific case. A number of courts, including the courts below in this case, have applied the "system fairness" standard. *See, e.g., CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 792 N.E.2d 155, 160 (N.Y. 2003) ("the relevant inquiry . . . is the overall fairness of England's 'legal system,' which is beyond dispute").

There has also been difference of opinion whether the rules governing recognition are State law or federal—the *Erie* problem. In this case no resolution of that issue is required. The Fifth and Fourteenth Amendments both require fair procedure as a basis of recognition of a judgment. The UK special procedure for Lloyd's disputes was not fair because it accorded Lloyd's the right unilaterally to determine its rights and duties with respect to "Names" and failed to provide for any adequate judicial review. The question, therefore, is one of Constitutional law concerning enforcement here of a foreign judgment. The issue is governed by the rule of Due Process in the Fifth Amendment or its counterpart in the Fourteenth Amendment.

III. The UK Procedure Was Fundamentally Unfair.

The concept of "reasonably fair judicial procedure" is expressed in various ways, including

Due Process and "first principles of justice." In general terms, fair procedure includes reasonable notice, opportunity to present evidence and argument, and determination by a neutral tribunal. *See, e.g.*, Principles 1, 5, and 30 of the ALI/UNIDROIT Principles of Transnational Civil Procedure 17-18, 22-24, 48-49 (2006); American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute, § 5, Reporters' Notes at 78 (2006) ("such basic principles as the court having judicial independence and impartiality, a right to the assistance of counsel of the party's choice, due notice and a right to be heard, and a fair opportunity and adequate time to present contentions and evidence." Soon after *Tumey* was decided, Justice Cardozo cited it, saying that "The guaranty of liberty in the constitutional law of the nation [requires that] . . . There must be judgment after notice and hearing. There must be trial by an impartial judge without interest in the event. . . ." Benjamin Nathan Cardozo, The Paradoxes of Legal Science (1928), in Margaret E. Hall Ed., Selected Writings of Benjamin Nathan Cardozo 327-328 (1947).

In whatever terminology the concept is expressed, the UK judgment did not afford fair procedure in this case, or in the hundreds of other claims by Lloyd's under its "R&R" arrangements. This blunt fact is shocking, given the generally fine reputation of the UK courts. But special legislation enacted to protect Lloyd's enabled it to shift mounting environmental losses from itself to newly enrolled "Names" without their consent and directly contrary to instructions not to invest in syndicates

involving environmental risks. As a result, the UK courts were precluded from affording "specific fairness," *i.e.* reasonably fair procedure to each Name, and Mr. Tropp was afforded only what Lloyd's considered was appropriate.

IV. Due Process in U.S. Courts

The Due Process requirement in the Fifth and Fourteenth Amendments refers specifically and individually to "any person." Accordingly, no court in the U.S. may enter or enforce a judgment resulting from a fundamentally unfair procedure. On the contrary, "specific fairness," not merely "system fairness," must be complied with. The leading U.S. authorities have dealt with specific defects in the rendering tribunals' procedure: *E.g., Pennoyer v. Neff*, 95 U.S. 714 (1877) (no adequate notice); *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987) (due process requirement applies to each individual defendant); *Tumey v. Ohio*, 273 U.S. 510 (1927) (trier of fact had financial interest in the outcome); *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813 (1986) (judge personally involved in case presenting same legal issue as that before his court). The proceedings below open the way for the UK judgment for Lloyd's to be recognized and enforced against Mr. Tropp and the many other "Names" who were pushed into liability by the "R&R" that Lloyd's carried out.

When a court in the United States enforces a foreign judgment that does not comport with basic fairness, that court itself denies due process to the defendant. This case does not involve issues at the margins of due process, *see Hilton v. Guyot, supra.* It involves principles of basic fairness, including the

right to an impartial tribunal and a reasonable opportunity to be heard.

V. The Core Due Process Principle of An Impartial Tribunal: *Tumey v. Ohio*

In *Tumey v. Ohio*, 327 U.S. 510 (1927), the Court held that the defendant was denied due process when the initial and critical decision-maker, the village mayor, convicted him of an offense while at the same time garnering fees from the conviction.

The *Tumey* principle is fundamental. Contrary to the Second Circuit's thought that it is limited to criminal cases, the Court not only relied on civil cases, but in subsequent civil cases has cited *Tumey* as controlling authority.

In *Tumey*, the Court set forth the English and U.S. history for the "general rule" that "officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided." 273 U.S., at 522. It cited various cases, including civil cases. *Id.*, at 522-531. To take just one, *Meyers v. Shields*, 61 Fed. 713, 725-731 (N.D. Ohio 1894), cited in *Tumey*, 273 U.S., at 528, held that a county auditor was disqualified "to make a valid assessment as the conclusion of the proceedings before him because of his direct pecuniary interest in the result . . . . [T]he auditor's compensation is directly dependent upon the finding he makes. . . . "[T]he proceedings . . . result in depriving the citizen of his property without due process of law, and are therefore invalid under the fourteenth amendment to the constitution of the United States." *Id.*, at 725, 726-727, 731.

In addition to relying on civil cases in *Tumey* itself, the Court has relied on *Tumey* as dispositive authority in subsequent civil cases. *E.g., Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (actual influence of judge not required, only whether sitting on the case would offer a possible temptation to the average judge to lead him "not to hold the balance nice, clear and true"); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (administrative board with pecuniary interest could not preside over a hearing); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 147-149 (1968) (supposedly neutral arbitrator who failed to disclose prior business relationship); *cf. Marshall v. Jerrico*, 446 U.S. 238, 248-249 (1980) (distinguishing an administrative prosecutor from an administrative law judge before whom, unlike here, an impartial *de novo* hearing was required after the prosecutor assessed a violation). For *Tumey's* continued critical importance in criminal cases, *see, e.g., Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (death penalty) (recognizing the right to an impartial adjudication as so basic to a fair trial that infraction can never be treated as harmless error); *Young v. United States ex rel. Vuitton et Fil S.A.*, 481 U.S. 787, 809-810 (1987) (contempt).

The Second Circuit rejected *Tumey* on the additional ground that Lloyd's self-interested determination was enforced by an impartial English court. Whether the enforcing court was "fair" or part of a generally "fair" system is not the point. The essential question is whether the fundamental decision-maker is impartial. For example, in *Tumey*,

the question was not whether the Ohio Court of Appeals or the Ohio Supreme Court was impartial but whether the mayor who convicted Tumey was impartial. Likewise, the question here is not whether the English court was impartial but whether Lloyd's and its captive entities were impartial. The underlying decision must be rendered by an impartial decision-maker. That decision-maker's pecuniary interest infects the entire case, notwithstanding the supposed impartiality of a reviewing or an enforcing court.

VI. The Due Process Limitation in Enforcement of Foreign Judgments

This case affords an important and useful opportunity to decide that a foreign judgment must satisfy an irreducible and core measure of individual due process beyond system fairness before it can be enforced in the United States. The Court should take the opportunity to make clear that, if a court in the United States gives legal effect to a foreign judgment that violates fundamental fairness, the enforcement of that U.S. judgment itself becomes a denial of due process. The core principle here is that the decision-maker must be impartial. It should be made clear under *Hilton v. Guyot* that this principle, which the Court has made clear for domestic judgments, also applies to foreign judgments. As a result of the current lack of clarity in basic constitutional principle, persons entitled to due process in the United States still risk enforcement of foreign judgments against them that fail to meet core principles such as impartiality, notice, and opportunity to be heard even if the foreign country in

which particular judgments are rendered generally maintains a fair "system."

The risk is amplified by the increasing globalization of litigation and aggressive assertion in some countries of subject matter and personal jurisdiction over U.S. defendants. The risk is aggravated by the confusion in the lower courts, federal and state, about the requisite basic and irreducible minimum of due process that must be achieved beyond "system fairness" before a foreign judgment will be enforced here. Although scholarly commentary and proposals such as those by the American Law Institute, *supra*, and the Uniform Law Commission in its recent Uniform Foreign-Country Money Judgments Recognition Act, §4(c)(8) (2005) (due process) provide some helpful guidance, they differ in their formulations, are not authoritative, and do not establish the clear constitutional marker that only this Court can establish. "System fairness" is not enough.

Suppose, for example, that a foreign court, in a country that qualifies for "system fairness" treatment, enforces a judgment of the critical decision-maker who was without question bribed. (It bears noting that in *Meyers v. Shields*, *supra,* which *Tumey* cited, the court described the auditor's fee as "not only in the nature of a bribe to decide against the citizen, but a corrupting inducement to make his finding the largest possible." 61 Fed., at 727.) Should a court in the United States hold that due process to the defendant "person" is satisfied because the foreign court acted in a generally fair system even though individual due process, at the core of *Tumey v. Ohio*, was without question denied? Such a

holding would undermine the principle of *Tumey v. Ohio* without advancing any legitimate interest of the United States or any foreign country. It would subvert the critical requirement of the Fifth and Fourteenth Amendments that courts, federal or state, accord due process to "any person" whose life, liberty, or property is at stake. Granting certiorari in this case will afford the Court an opportunity to make clear that U.S. persons are entitled to invoke the fundamental principle of *Tumey v. Ohio* against the enforcement of foreign judgments that violate that principle.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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